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FOR THE JUNIORS.

PROPERTY IN THE ELEMENTS OF LIGHT AND AIR—(1) *By prescription, or the doctrine of "ancient lights."* The English doctrine of ancient lights, though adopted in a few of the earlier American decisions, has been repudiated by all, or practically all, of the American courts, as wrong in principle and as not adapted to the rapid physical development of our country, tending as it does to especially retard the building up of towns and cities.

It may be safely asserted, as a general proposition of American law, that no right to air or light can be acquired by prescription, or long use; and that if such right exist at all, it is by grant, either express, or implied from absolute necessity, as shown below.

There cannot, in the nature of things, be any *adverse* use of light or air from another's lot, because the enjoyment does not invade the latter's right in any manner. He cannot enjoin such use nor recover damages for it. Having suffered no legal wrong, he has never had a cause of action against the adjoining owner; hence the statute of limitations, or the common law presumption of a grant from adverse use, has no application. *Parker v. Foote*, 19 Wend. 308, reported, with extensive annotations, in 4 Sharswood & Budd's L. C. on Am. Law of Real Prop., p. 247; *Taylor Land & Ten.*, 239, 380 and n.; Washburne on Easements, marg. p. 498 *et seq.*; *Goddard on Easements* (Bennett's Ed.) 231 *et seq.*; 17 Am. Law Reg. 440; *Pierre v. Fernald*, 26 Me. 436 (46 Am. Dec. 573, and extensive note); *Napier v. Bulwinkle*, 5 Rich. (S. C.) 311; *Keats v. Hugo*, 115 Mass. 204 (15 Am. Rep. 80); *Smith v. White*, 11 Md. 23; *Powell v. Sims*, 5 W. Va. 1 (13 Am. Rep. 629); *Guest v. Reynolds*, 68 Ills. 478 (18 Am. Rep. 570); *Keating v. Springer* (Ills.), 34 N. E. Rep. 805; *Mullen v. Strickler*, 19 Ohio St. 135 (2 Am. Rep. 379); *Klein v. Gehrung*, 25 Tex. Sup. 233 (78 Am. Dec. 565 and note); *Turner v. Thompson*, 58 Ga. 268 (24 Am. Rep. 497); *Tunstall v. Christian*, 80 Va. 1 (56 Am. Rep. 581).

(2) *By Contract.* (a) Contract express: Of course, such an easement may, like any other, be created by express contract, either by grant, covenant or reservation. See *ca. ci. infra*; and see especially note to *Ladd v. City of Boston* (151 Mass. 585), in 21 Am. St. Rep. 484-508. (b) By contract implied: The doctrine of the English courts that the conveyance of a house whose windows overlook a vacant lot belonging also to the grantor, carries with it by implication the right of the grantee to the easement of light and air, which right the grantor will not be permitted to disturb by buildings erected on the vacant lot, is countenanced by many *dicta* of American judges, and by a few decisions, but the doctrine best supported by American authority is that no such easement will pass by the mere conveyance of the adjoining house and lot; but that unless there are special circumstances to take the case out of the general rule—as, for example, the *absolute necessity* of the easement in order to the enjoyment of the grant, where light and air cannot otherwise be supplied—the grantor may build on the vacant lot retained, and thus obstruct the windows of the house on the lot conveyed.

As favoring the doctrine of the "implied easement," see: *Sutphin v. Merkelson*,

38 N. J. Eq. 318; *Jones v. Jenkins*, 34 Md. 1. As opposed to it, see: *Rennyson's Appeal* (Pa.), 39 Am. Rep. 777; *Myers v. Gemmel*, 10 Barb. 537; *Keating v. Springer* (Ills.), 34 N. E. Rep. 805; *Collier v. Pierce*, 7 Gray, 18 (66 Am. Dec. 453 and note); *Keats v. Hugo*, 115 Mass. 204 (15 Am. Rep. 80); *Doyle v. Lord*, 64 N. Y. 439 (21 Am. Rep. 629); *Mullen v. Strickler*, 19 Ohio St. 135 (2 Am. Rep. 379); *Powell v. Sims*, 5 W. Va. 1 (13 Am. Rep. 629); *Turner v. Thompson*, 58 Ga. 268 (24 Am. Rep. 497); *Morrison v. Marquardt*, 24 Iowa 35 (92 Am. Dec. 444 and note)—an excellent opinion by Dillon, Ch. J.; *Keiper v. Klein*, 51 Ind. 316.

SURFACE WATER.—Disputes between riparian proprietors as to their respective rights in *natural* water courses, are usually in connection with the pollution or diminution of the water. But in connection with *surface* water, there is rarely any controversy as to the right to enjoy it, or any complaint of its diminution. On the contrary, surface water is generally regarded as undesirable, so much so that the maxim of the common law is that "surface water is a common enemy." Questions under this head usually arise out of the complaint of the lower proprietor that the owner of upper estate has collected the surface water in artificial channels, and is discharging it upon the lower estate in increased volume, to the injury of the latter—or else the upper proprietor complains that the lower has, by building dikes or other obstructions for the protection of his own property, thrown back the surface water on the upper estate to its injury.

The authorities are in hopeless conflict as to the respective rights of the upper and lower proprietors in these particulars. One line of cases holds that surface water is a common enemy, and that any proprietor may get rid of it as best he may, and may protect his own property against it, even though in so doing it be thrown back on the upper estate. This is usually designated as the "common law rule." Another line holds that the lower estate is burdened with a servitude in favor of the upper for the flow of surface water, from natural causes, flowing in a natural manner. This is known as the "civil law rule."

It seems to be agreed, however, that the upper proprietor cannot collect the surface water in artificial channels or ditches, and cast it upon the lower estate in concentrated volume; and that, on the other hand, the lower proprietor cannot obstruct a natural channel along which the surface water has been accustomed to flow from the land above. And even in those States where the civil law rule prevails, it is generally held not to apply to lots in cities, towns and villages, where the lower proprietor interrupts the flow of surface water by the erection of buildings or other improvements on his property.

In modern times this subject has assumed especial importance in connection with the building of railroads, whose embankments interfere with the flow of surface water from adjoining farms.

The subject will be found discussed at large in the following authorities: Wood on Nuisances, 377-399; Gould on Waters, 273; 2 Dillon Munic. Corp., 1038 *et seq.*; Angell on Water Courses, 108a, 108b; Washburn on Easements (3d Ed.), 353 (3a); *O'Connor v. F. A. & P. R. R. Co.* (Wis.), 5 Am. & Eng. R. R. Cas. 83 and note (s. c. 38 Am. Rep. 753 and note); *Franklin v. Fisk* (Mass.), 90 Am. Dec. 194; *Rowe v. R. R. Co.* (Minn.), 16 Am. St. Rep. 706; *Johnson v. R. R. Co.* (Wis.), 27 Id. 76; *Gray v. McWilliams* (Cal.), 35 Id. 163 and note; *Edwards v. Charlotte*